(5)

No. 06-729

FILED

JAN 26 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Petitioners,

v.

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, LTD., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICI CURIAE* OF THE STATES OF COLORADO, NEW MEXICO, ALASKA, IDAHO, NEBRASKA, NEVADA, NORTH DAKOTA, AND UTAH, IN SUPPORT OF PETITIONERS

JOHN W. SUTHERS,
Attorney General
DANIEL D. DOMENICO,
Solicitor General*
WILLIAM C. ALLISON, V, First
Assistant Attorney General
ANNETTE M. QUILL,
Assistant Attorney General
State of Colorado
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
303-866-4500
303-866-3558 (fax)

GARY K. KING,
Attorney General
STEPHEN R. FARRIS,
Assistant Attorney General
JUDITH ANN MOORE,
Assistant Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504
505-827-6010
505-827-4440 (fax)

*Counsel of Record for all Amici

(Additional Counsel And *Amici* Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PETER D. NICHOLS,
Special Assistant
Attorney General
State of Colorado
PEGGY E. MONTAÑO,
Special Assistant
Attorney General
State of New Mexico
TROUT, RALEY, MONTAÑO,
WITWER & FREEMAN, P.C.
1120 Lincoln Street,
Suite 1600
Denver, Colorado 80203

TALIS J. COLBERG
Attorney General
State of Alaska
P.O. Box 110300
Juneau, Alaska 99811-0300

LAWRENCE WADSEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010

CATHERINE CORTEZ MASTO
Attorney General
State of Nevada
100 North Carson Street
Carson City, Nevada
89701-4717

MARK L. SHURTLEFF
Attorney General
State of Utah
Utah State Capitol Complex
East Office Building,
Suite 320
Salt Lake City, Utah
84114-2320

JON BRUNING
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, Nebraska 68509

WAYNE STENEHJEM
Attorney General
State of North Dakota
600 East Boulevard Avenue
Bismark, North Dakota
58505-0040

QUESTION PRESENTED

Western States depend upon thousands of water transfers to move billions of gallons of water every day to meet essential domestic, municipal, commercial, industrial, agricultural and other needs. The question *Amici* will address is: Whether extending the National Pollutant Discharge Elimination System to water transfers would violate the established federal-state framework of deference to State water allocation law, as also embodied in Congress' specific instruction in the Clean Water Act, 33 U.S.C. § 1251(g), not to supersede, abrogate, or impair either the authority of each State to allocate water or the States' individual water allocations.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

REASONS FOR GRANTING THE PETITION 4

ARGUMENT 4

I. THE SECOND CIRCUIT'S DECISION DOES NOT COMPORT WITH THIS COURT'S DECISIONS IN *MICCOSUKEE*, *PUD NO. 1*, AND *S.D. WARREN* 4

A. THE SECOND CIRCUIT'S DECISION HIGHLIGHTS THE CONTINUING IMPORTANCE OF ISSUES RECOGNIZED BY THIS COURT IN ITS 2004 *MICCOSUKEE* DECISION 5

B. THE SECOND CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S DECISIONS IN *PUD NO. 1* AND *S.D. WARREN* 6

II. REQUIRING NPDES PERMITS FOR WATER TRANSFERS IS CONTRARY TO THE ESTABLISHED FEDERAL-STATE FRAMEWORK OF DEFERENCE TO THE STATES' ALLOCATION OF WATER AND THE POSITION OF THE AGENCY CHARGED WITH ADMINISTERING THE CLEAN WATER ACT 8

A. CONGRESS EXPRESSLY PRESERVED THE ESTABLISHED FEDERAL-STATE FRAMEWORK OF DEFERENCE TO THE STATES' ALLOCATION OF WATER IN THE CLEAN WATER ACT 8

B. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE POSITION OF THE AGENCY CONGRESS CHARGED ADMINISTERING THE CLEAN WATER ACT 11

TABLE OF CONTENTS – Continued

Page

III. EXTENDING NPDES PERMITS TO WATER TRANSFERS WOULD SUPERSEDE, ABROGATE OR IMPAIR THE STATES' ALLOCATION OF WATER AND INTERFERE WITH INTERSTATE COMPACTS AND THIS COURT'S INTERSTATE WATER APPORTIONMENTS ... 14

A. REQUIRING NPDES PERMITS WOULD ABROGATE OR IMPAIR THE STATES' WATER ALLOCATIONS BECAUSE WATER TRANSFERS COULD NOT COMPLY WITH PERMIT CONDITIONS 14

B. THE CLEAN WATER ACT AUTHORIZES STATES TO ADOPT MORE STRINGENT REQUIREMENTS RESPECTING DISCHARGES OF POLLUTANTS ... 17

C. REQUIRING NPDES PERMITS FOR WATER TRANSFERS WOULD INTERFERE WITH INTERSTATE COMPACTS AND THIS COURT'S WATER APPORTIONMENTS..... 18

CONCLUSION..... 20

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 373 U.S. 546 (1963) 19

California Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 9

California v. United States, 438 U.S. 645 (1978) 11

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) 1

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F.3d 77 (2d Cir. 2006) 1, 5, 6

Committee to Save Mokulumne River v. E. Bay Mun. Util. Dist., 13 F.3d 305 (9th Cir. 1993) 15

Environmental Def. Fund, Inc. v. E. Bay Mun. Dist., 26 Cal.3d 183, 605 P.2d 1 (1980) 17

Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist., No. 02-80309-Civ-Altonaga/Turnoff, slip op. at 84 (S.D. Fla. 2006) 1

Gregory v. Ashcroft, 501 U.S. 452 (1991) 9

National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 12

Northern Great Plains Res. Council v. Fidelity Exploration and Dev. Co., 325 F.3d 1115 (9th Cir. 2003) 2

Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985) 16

PUD No. 1 v. Washington Dep't of Ecology, 511 U.S. 700 (1994) 4, 7

TABLE OF AUTHORITIES – Continued

Page

S.D. Warren v. Maine, ___ U.S.___, 126 S. Ct. 1184 (2006) 5, 7

Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985) 18

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 13

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) ...8, 9, 11

South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 1, 5, 14

Tulkisarmute Native Cmty. Council v. Heinze, 898 P.2d 935 (Alaska 1995) 18

United States v. Lopez, 514 U.S. 549 (1995) 9

United States v. Mead Corp., 533 U.S. 218 (2001) 13

Vanscoter v. Sullivan, 920 F.2d 1441 (9th Cir. 1990) 12

Western Nuclear v. Huffman, 825 F.2d 1430 (10th Cir. 1987) 12

Young v. Community Nutrition Inst., 476 U.S. 974 (1986) 12

STATUTES

33 U.S.C. § 1251(b) (2006) 9

33 U.S.C. § 1251(g) 9, 10

33 U.S.C. § 1311(b)(1)(C) 16

33 U.S.C. § 1313(e)(3)(A) 16

33 U.S.C. § 1314(e) 15

33 U.S.C. § 1342 13

33 U.S.C. § 1370 ..... 9, 17

TABLE OF AUTHORITIES – Continued

Page

Colorado River Compact, 42 Stat. 171 (1921) 19

Rio Grande Compact, 53 Stat. 785 (1939) 19

CAL. WATER CODE §§ 1257, 1258 (2006) 17

CAL. WATER CODE § 13000 *et seq.* 17

COLO. REV. STAT. § 25-8-202(7)(b)(II)(A) (2006) 18

COLO. REV. STAT. § 25-8-205(1)(c) 17

COLO. REV. STAT. § 25-8-501(1) 18

COLO. REV. STAT. § 25-8-503(5) 17

REGULATIONS

40 C.F.R. § 122.44(d)(1)(i) (2006) 15

40 C.F.R. § 130.2(m) 16

40 C.F.R. § 131.12(a)(2) 15

RULES

Supreme Court Rule 37.4 1

OTHER AUTHORITIES

Agency Interpretation on the Applicability of Section 402 of the Clean Water Act to Water Transfers, Docket No. EPA-HQ-OW-2006-0141 (Aug. 5, 2005) 12

H.R. CONF. REP. No. 95-830 (1977) 10

TABLE OF AUTHORITIES – Continued

Page

NPDES Water Transfers Proposed Rule, 71 Fed. Reg. 32887 (Proposed June 7, 2006) 12

United States Department of Interior, Bureau of Reclamation, *Water Supply Crises by 2025*, http://www.doi.gov/water2025 (May 2003) 3

INTEREST OF *AMICI CURIAE*

Amici Curiae, the Attorneys General of the States of Colorado, New Mexico, Alaska, Idaho, Nebraska, Nevada, North Dakota, and Utah submit this brief pursuant to Supreme Court Rule 37.4 in support of New York City's ("NYC") Petition for a Writ of Certiorari seeking reversal of the lower court's decision in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) ("*Catskill II*").

In *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, this Court concluded that a permit under § 402 of the Clean Water Act ("CWA" or "Act") is *not* required for a water transfer where the source and receiving water bodies are not "meaningfully distinct." 541 U.S. 95, 112 (2004). The Second Circuit adopted the inverse of this holding in *Catskill II*, affirming its holding in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), that a transfer of water containing pollutants from one distinct water body into another is an "addition of [a] pollutant" under the Act, and accordingly a permit for NYC's transfer was required. 451 F.3d at 80; 84-85. This Court should clarify its *Miccosukee* decision regarding ...n and if such permits are required to remove the treme idous uncertainty created by the holding of the Second Circuit,[1] which would severely reduce the essential water supplies of

[1] Additional uncertainty arises from the recent holding of the Southern Florida District Court that "water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable water body are subject to the NPDES permitting program." *Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist.*, No. 02-80309-Civ-Altonaga/Turnoff, slip op. at 84 (S.D. Fla. 2006).

the nation's citizens, businesses, and industries who rely on thousands of water transfers every day.[2]

The western part of the United States is generally arid; that is, it receives less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture. Since most precipitation in the West falls as snow, water must be captured when and where the snow melts in remote areas far from the major urban and agricultural centers that need the water. Hence, it is necessary to transfer water through complex systems of manmade and natural conveyances and reservoirs to places of need and use. These water transfers allow the West to sustain its cities, farms, and ranches. Without this elaborate system of water transfers, many nationally-important agricultural regions could not grow crops, including the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, and the Snake River Valley of Idaho. Similarly, many of the West's great cities could not exist, including Albuquerque, Cheyenne, Denver, Las Vegas, Los Angeles, Phoenix, Reno, Salt Lake City, and San Francisco.

Under individual water rights determined pursuant to State water law, countless public and private entities in the western United States divert water from natural streams and lakes. Many then transfer water through manmade tunnels, canals, and pipelines into other natural streams and lakes to meet the water needs of residents in other watersheds. Water transfers may be as simple as the

---

[2] *Amici* distinguish the discharge of produced waters from coal bed methane ("CBM") from water transfers that are at issue in this case. *See, e.g., Northern Great Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1115, 1163 (9th Cir. 2003) ("CBM water is a pollutant pursuant to the CWA").

diversion of water from a river into an adjacent (but hydrologically separate) stream for delivery to a nearby field, or as massive as the transfer of Sacramento River water by the federal Central Valley Project and State Water Project to serve citizens throughout northern, central, and southern California. In the Upper Colorado River Basin alone there are at least 36 major water transfers that move approximately 229 billion gallons of water per year from the basin of origin for use in another basin, often in another State. Extending the National Pollutant Discharge Elimination System ("NPDES") program to such water transfers supersedes, abrogates, or impairs each of these water transfers, which would prevent *Amici* from meeting the essential water demands of more than 60 million residents of the arid West.

The Department of the Interior predicts western water supply crises by 2025 because of competing demands from explosive population growth in arid areas, emerging needs for environmental and recreational uses, and the growing importance of food and fiber production from western farms and ranches. *See* United States Department of Interior, Bureau of Reclamation, *Water Supply Crises by 2025*, http://www.doi.gov/water2025 (May 2003). Unfortunately, existing water supplies that rely on water transfers are currently inadequate even in years with normal precipitation. *Id.* Extension of the NPDES Program to water transfers would exacerbate the looming crises by reducing the volume of essential water that could be transferred to places of need.

In sum, the ability to divert, transport, store, and use water is critical to the social and economic well-being of the West. Moving water from one basin to another is essential to meet domestic, municipal, commercial, industrial, and

agricultural demands. Extension of the NPDES Program to water transfers gravely threatens the continued vitality of this system.

REASONS FOR GRANTING THE PETITION

There are three reasons this Court should grant the Petition. First, the Petition presents a clear question of law that this Court recognized in *Miccosukee* is one of national importance, and particularly to the West. Second, because the Second Circuit's decision conflicts with the established federal-state framework and Congress' express deference to State water allocations in the Clean Water Act and with the official position of the agency charged with administering the Act, the decision below creates costly confusion and uncertainty for State water allocation planning and water quality regulation. Third, extension of the NPDES Program to water transfers would supersede, abrogate, or impair State water law and State water allocations and interfere with interstate compacts and this Court's interstate water apportionments.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION DOES NOT COMPORT WITH THIS COURT'S DECISIONS IN *MICCOSUKEE, PUD NO. 1,* AND *S.D. WARREN.*

The Second Circuit's decision requiring NPDES permits for water transfers is at odds with this Court's acknowledgement in *Miccosukee* that imposition of the NPDES permitting program on water transfers would violate Congress' specific instruction in the Clean Water Act to defer to the authority of the States to allocate water. Moreover, the Second Circuit's decision rests on a misreading of this Court's decision in *PUD No. 1 v. Washington*

Dep't of Ecology, 511 U.S. 700 (1994), a decision reinforced last term by *S.D. Warren v. Maine*, ___ U.S.___, 126 S. Ct. 1184 (2006). In those cases, this Court affirmed the authority of States to impose *State* – not federal – water pollution controls on State water allocations. This Court should grant the Petition to correct the Second Circuit's misinterpretation that is causing great national uncertainty about essential water transfers.

A. The Second Circuit's Decision Highlights the Continuing Importance of Issues Recognized By This Court In Its 2004 *Miccosukee* Decision.

The Second Circuit held that all water transfers are subject to the NPDES permitting requirement under the CWA. *Catskill II*, 451 F.3d at 84-85. In *Miccosukee,* this Court acknowledged the potentially far-reaching effects of requiring NPDES permits for water transfers and the unique importance of this issue to western States:

> If we read the Clean Water Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies. *See* Brief for Colorado et al. as *Amici Curiae* 2-4. Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES Program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within

> its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act.

541 U.S. at 108. The Second Circuit's decision requiring NPDES permits for water transfers is inconsistent with these valid concerns, thus highlighting the continuing importance of this issue for the nation.

As it now stands, water suppliers, including western States, major western municipalities, water supply districts, and irrigators who depend on water transfers, suffer from a lack of certainty both regarding the continued availability of their existing water supplies and the cost of delivering whatever water supplies would remain available to them if NPDES permits are required. State water quality agencies would also benefit from clarity as to whether they should require permits under their respective programs. If the established federal-state framework is maintained as Congress intended, these entities will be able to continue supplying water at a reasonable cost. If, however, the Second Circuit's interpretation prevails, the water supply system in the West will have to be revamped, at a much higher cost.

B. The Second Circuit's Decision Is Inconsistent With This Court's Decisions In *PUD No. 1* And *S.D. Warren*.

To reach its decision, the Second Circuit concluded "[t]he power of the states to allocate quantities of water within their borders is *not inconsistent with federal regulation* of water quality" through the NPDES permitting scheme. *Catskill II*, 451 F.3d at 84 (emphasis added). That conclusion rests on a misreading of this Court's prior decisions. *PUD No. 1* and *S.D. Warren* affirm the authority

of the States – not the federal government – to impose *State* water pollution controls on State water allocations.

In *PUD No. 1*, the State of Washington issued a § 401 water quality certification imposing a variety of conditions on a hydroelectric project, including a minimum stream flow requirement. 511 U.S. at 709. As this Court explained, "State water quality standards adopted pursuant to § 303 are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process." *Id.* at 713. Similarly, in *S.D. Warren*, the State of Maine "issued certifications that required Warren to maintain a minimum stream flow in the bypassed portions of the river and to allow passage for migratory fish and eels." 126 S.Ct. at 1847. As in *PUD No. 1*, this Court recognized that "State certifications under § 401 are essential in the scheme to preserve State authority to address the broad range of pollution." *Id.* at 1853.

This Court also recognized that State imposition of water pollution controls under § 401 on State water allocations is entirely consistent with Congress' mandate in § 101(g) of the Act, which expressly preserves "the authority of each State to allocate quantities of water within its jurisdiction." *PUD No. 1*, 511 U.S. at 720. For the federal government to exercise such water pollution control authority over State water allocations pursuant to § 402, in contrast, is not supported by this Court's decisions in *PUD No. 1* and *S.D. Warren* and is inconsistent with Congress' mandate in § 101(g) of the Act, as explained below.

In sum, the Second Circuit's decision does not comport with this Court's reading of the Clean Water Act in *Miccosukee, PUD No. 1* and *S.D. Warren*.

II. Requiring NPDES Permits For Water Transfers Is Contrary To The Established Federal-State Framework Of Deference To The States' Allocation Of Water And The Position Of The Agency Charged With Administering The Clean Water Act.

As explained below, Congress expressed its clear intent to defer to State water allocation law and specific State water allocations in the plain language of the Act, as confirmed by its legislative history. The Second Circuit, however, adopted a statutory interpretation of the Act that would fundamentally alter the established federal-state framework of deference to State water allocations. Requiring an NPDES permit for water transfers is contrary to Congress' directives not to interfere with the federal-state framework and the position of the agency Congress charged with administering the Act.

A. Congress Expressly Preserved The Established Federal-State Framework Of Deference To The States' Allocation Of Water In The Clean Water Act.

Land and water uses are traditionally and primarily State prerogatives. *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001).

> Unless Congress has expressed a clear intent for federal regulation in an area of traditional State authority, this Court has warned against statutory interpretations that alter the federal-state framework by permitting federal encroachment upon a traditional state power. "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."

> Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

Id. at 173 (citations omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *California Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935). Congress expressed its clear intent in the Act to preserve, rather than alter, the established federal-state framework through purposeful and continued deference to State water law. 33 U.S.C. §§ 1251(b), 1251(g), 1370 (2006).

In 1972, Congress incorporated its long-standing deference to State water law in § 510 of the Act, stating "[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. At that time, Congress also expressed a general policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . " 33 U.S.C. § 1251(b). In adopting the Act, Congress clearly intended that primary authority over water administration matters would continue to rest with the States.

In the 1977 amendments to the Act, Congress took the opportunity to reiterate and clarify its intent with respect to State authority over water quantity issues:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is

> the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g).[3] Here, Congress mandated not only deference to the States, but also respect for individual water rights determined pursuant to the States' water laws. To the extent water quality concerns arise in the context of water allocations, the Act requires the federal government to cooperate with the States to develop comprehensive solutions. *Id.*

Notably, the 1977 amendment strengthened language adopted just five years earlier in §§ 101(b) and 510 that recognized federal deference to the States in the matter of State control over water quantity issues. Thus, over time

---

[3] In adopting § 101(g), Congress reacted swiftly and decisively to the suggestion that diminishing water transfers under State water law might be necessary to solve water quality problems. The Conference Committee stated:

> [I]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction should not be superseded, abrogated or otherwise impaired by this Act. . . . [and] that nothing in this Act should be construed to supersede or abrogate rights to quantities of water that have been established by any State.

H.R. CONF. REP. No. 95-830, at 52 (1977), *reprinted in* 3 LEGISLATIVE HISTORY OF THE CLEAN WATER ACT OF 1977, at 236 (1978) (committee print compiled for the Committee on Environment and Public Works by the Library of Congress); *see also* S. DEB.: August 4, 1977, *Id.* at 1030 (Remarks of Sen. Wallop during Senate debate on the amendment); S. DEB.: Dec. 15, 1977, *Id.* at 531 (Remarks of Sen. Wallop explaining conference report).

Congress added language to the Act that reinforced and strengthened federal deference to State water law and water allocations.

The Supreme Court and Congress have spoken with clear and consistent voices regarding the allocation of water. For example, subsequent to Congress' adoption of the Act in 1972 and § 101(g) in 1977, this Court observed in its landmark decision in *California v. United States,* 438 U.S. 645, 653 (1978):

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

The Second Circuit adopted a construction of the Act that would fundamentally alter the established federal-state framework of deference to State water law. Contrary to Congress' specific instruction, extending the NPDES program to water transfers would supersede, abrogate, or impair State water allocations, which would prevent *Amici* from meeting the essential water needs of their residents. Imposing NPDES permitting requirements on water transfers would be "plainly contrary to the intent of Congress." *Solid Waste Agency*, 531 U.S. at 174.

B. The Second Circuit's Decision Conflicts With The Position Of The Agency Congress Charged Administering The Clean Water Act.

The Second Circuit's decision directly conflicts with the official position of the Environmental Protection Agency ("EPA"), which is that "Congress did not generally intend to subject water transfers to the NPDES Program.

Rather, Congress intended to leave the oversight of water transfers to water resource management agencies and the States." NPDES Water Transfers Proposed Rule, 71 Fed. Reg. 32887, at 32891 (Proposed June 7, 2006) ("EPA's Proposed Rule"); Agency Interpretation on the Applicability of Section 402 of the Clean Water Act to Water Transfers, Docket No. EPA-HQ-OW-2006-0141, at 8 (Aug. 5, 2005) ("EPA's Interpretation").

EPA's Proposed Rule and Interpretation codify the agency's long-standing reading of the Act. *See National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982) ("EPA's construction was made contemporaneously with the passage of the Act, and has been consistently adhered to since."). That EPA did not find it necessary to promulgate a formal rule on water transfers earlier should not undermine the level of deference to which EPA is entitled. The question simply was not a national issue before the *Miccosukee* decision, because there was nearly universal understanding that water transfers were not subject to the NPDES Program.

EPA's Proposed Rule is entitled to considerable deference. *See, e.g., Vanscoter v. Sullivan*, 920 F.2d 1441, 1449 (9th Cir. 1990) ("Although the . . . transmittal and subsequent Notice of Proposed Rulemaking may not themselves have the force of law, they constitute the Secretary's authoritative administrative interpretation of the governing statute . . . [w]e find the Secretary's interpretation of the statute reasonable and defer to it.").

EPA's Interpretation is also entitled to deference on its own merits. *See, e.g., Young v. Community Nutrition Inst.*, 476 U.S. 974, 981 (1986) ("We find the FDA's interpretation of § 346 to be sufficiently rational to preclude a court from substituting its judgment for that of the FDA."); *Western Nuclear v. Huffman*, 825 F.2d 1430, 1438 (10th

Cir. 1987), *rev'd on other grounds and remanded*, 486 U.S. 663 (1988) (The critical point in the analysis was that the "FDA [had] advanced an interpretation of an ambiguous statutory provision. Once that point was reached, the Court was required to defer to the reasonable interpretation of the agency." [citation omitted]).

EPA's Proposed Rule and Interpretation are entitled to at least the degree of deference afforded under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). "[A]n agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (quoting *Skidmore*, 323 U.S. at 139). The measure of deference the Court should give to an administrative interpretation in a given case depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control," *Skidmore*, 323 U.S. at 140, as well as its formality and relative expertness. *Mead*, 533 U.S. at 228.

The conflict between the Second Circuit's decision and EPA's position is of more than theoretical interest because EPA has not delegated administration of the NPDES Program to all States under the Act.[4] 33 U.S.C. § 1342. For example, the Connecticut River forms the boundary between Vermont and New Hampshire. The Second Circuit's decision would require an NPDES permit for a water transfer from the Connecticut River into Vermont, a

[4] For example, Colorado is a delegated State; New Mexico is not.

delegated State within the Second Circuit, while EPA would not require a permit for a water transfer *from the same river* into adjacent New Hampshire, a non-delegated State outside the Second Circuit where EPA administers the NPDES Program.

III. EXTENDING NPDES PERMITS TO WATER TRANSFERS WOULD SUPERSEDE, ABROGATE OR IMPAIR THE STATES' ALLOCATION OF WATER AND INTERFERE WITH INTERSTATE COMPACTS AND THIS COURT'S INTERSTATE WATER APPORTIONMENTS.

Expanding the NPDES Program to include water transfers would eviscerate the fundamental doctrine of State water allocation law because it would either limit or, in some cases, end the transfer of water. Permit conditions that prevent or render prohibitively costly the transfer of some or all of the water legally available to individual water rights allocated under State law would directly supersede or abrogate State water allocations, injuring *Amici* and western water users. Further, requiring permits for water transfers would jeopardize interstate compacts and this Court's interstate water apportionments.

A. REQUIRING NPDES PERMITS WOULD ABROGATE OR IMPAIR THE STATES' WATER ALLOCATIONS BECAUSE WATER TRANSFERS COULD NOT COMPLY WITH PERMIT CONDITIONS.

The Second Circuit's holding that the CWA requires permits for water transfers would have drastic effects on the historic practice of transporting water where it is most needed. In *Miccosukee*, this Court postulated that general permits might ameliorate the impact of extending the

NPDES Program to water transfers. 541 U.S. at 108-09. General permits might alleviate the administrative burden upon permit-issuing agencies. However, general permits would not address the impact on State water allocations. All NPDES permits – general as well as individual permits – must include limitations to comply with water quality standards.[5] All permits are also subject to antidegradation requirements[6] and may include requirements for the use of best management practices[7] for

---

[5] If a discharge merely has the "potential to cause . . . an excursion above any State water quality standard," its NPDES permit must contain conditions to control all contributing pollutants. 40 C.F.R. § 122.44(d)(1)(i) (2006); *see also Committee to Save Mokulumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993). ("The [Clean Water] Act does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act categorically prohibits any discharge of a pollutant from a point source without a permit."). Thus, an NPDES permit necessarily contains conditions that limit the amount of pollutants delivered to the receiving waters regardless of whether standards are, in fact, exceeded or whether the transfer has the potential to cause an exceedance. Water quality almost inevitably varies between basins. Movement of water from one basin to another would therefore be subject to a permit limit(s) even though the transferor has no ability to control naturally-occurring or ubiquitous pollutants.

[6] Where the quality of waters "exceed[s] levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water," the antidegradation provisions of the Act apply to maintain and protect existing quality. 40 C.F.R. § 131.12(a)(2). Although transferred water is often suitable for beneficial use without treatment, water transfers would nonetheless be subject to this "no degradation" requirement if an NPDES permit were necessary. Antidegradation requirements can apply where only one water quality constituent is better than the corresponding stream standard. The only practical way for many diverters to meet antidegradation requirements for high quality waters may be to curtail transfers and forgo the use of a portion of their State-allocated water right.

[7] NPDES permits may require best management practices ("BMPs"). 33 U.S.C. § 1314(e). BMPs are methods and practices, including structural

(Continued on following page)

dischargers. 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A). Thus, the general permit process would not change NPDES Program requirements that would force many transferors to forgo the full exercise of their State water rights.

If required to operate under NPDES permits – general or individual – many water rights owners would have no alternative but to curtail their transfers to meet water quality standards and antidegradation requirements of the Act, as it would be impractical and cost prohibitive to construct treatment facilities. These substantive provisions would apply regardless of how simplified the administrative process might be.[8]

---

and nonstructural controls and operation and maintenance procedures, applied before, during, or after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters. *See, e.g.*, 40 C.F.R. § 130.2(m). Adherence to BMPs – generally simpler and less costly than the usual technological controls – does not automatically assure compliance with requirements of the Act concerning water quality standards, *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581 (9th Cir. 1985), *rev'd on other grounds and remanded by Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), or antidegradation. Furthermore, it is difficult to envision how many water providers would utilize BMPs in an economical manner to control source water quality without significantly curtailing the full use of their State-allocated water rights.

[8] Even for States such as Alaska, which is currently seeking EPA's approval to administer the NPDES Program and where arid conditions generally are not an issue, the economic cost of authorizing water transfers under the NPDES permit system would pose a tremendous, impractical and unrealistic burden for the administering agency and an applicant, while at the same time usurping existing and adequate State authorities already governing water transfers.

B. The Clean Water Act Authorizes States To Adopt More Stringent Requirements Respecting Discharges Of Pollutants.

Many States have enacted water quality laws to supplement the Act, authority explicitly recognized by the Congress. 33 U.S.C. § 1370. For example, the State Water Project and Central Valley Project in California are the largest water transfers in the country. These transfers are regulated under State water allocation laws that may impose requirements to protect water quality, e.g., CAL. WATER CODE §§ 1257, 1258 (2006), and under State water quality law, CAL. WATER CODE § 13000 *et seq. See also Environmental Def. Fund, Inc. v. East Bay Mun. Dist.*, 26 Cal.3d 183, 198, 605 P.2d 1, 9 (Cal. 1980) (The State Water Resources Control Board "has been granted broad authority to control and condition water use, insuring utilization consistent with the public interest. . . . The [board's] powers extend to regulation of water quality.").

Colorado has similar State statutory authority to regulate any "activity" that causes "the quality of any State waters to be in violation of any applicable water quality standard." COLO. REV. STAT. § 25-8-205(1)(c) (2006). The Colorado statute also contains specific regulatory authority empowering the State to protect water quality through the adoption of control regulations[9] for discharges from the "diversion, carriage, and exchange of water from or into streams, lakes, reservoirs, or conveyance structures, or storage of water in or the release of water from lakes, reservoirs, or conveyance structures." COLO. REV. STAT. § 25-8-503(5). The

[9] Control regulations may, for example, "describe precautionary measures, both mandatory and prohibitory, that must be taken by any person . . . [who] could reasonably be expected to cause pollution of any state waters . . . or . . . be in violation of any applicable water quality standard." COLO. REV. STAT. § 25-8-205(1)(c).

State may also adopt control regulations when necessary to assure compliance with water quality standards and classifications. COLO. REV. STAT. § 25-8-202(7)(b)(II)(A).[10]

A number of States can also apply a "public interest test" to protect water quality when granting a water right. For example, in Idaho, "if an applicant's appropriation of water will conflict with the local public interest . . . then the Director may reject such application and refuse a permit therefore . . . or may grant a permit upon conditions." *Shokal v. Dunn*, 109 Idaho 330, 336, 707 P.2d 441, 448 (1985) (internal quotations omitted). Similarly, Alaska "may not issue a permit unless doing so is in the public interest," considering the "impacts of water appropriation on fish and game resources, and public health." *Tulkisarmute Native Cmty. Council v. Heinze*, 898 P.2d 935, 950 (Alaska 1995).

In each of these examples, the States have authority under State law to protect water quality as well as the vital transfer of water for beneficial use. If a State determines that discharge permits for water transfers are needed, then that State is free to adopt such a program. However, the Clean Water Act does not require States to do so.

C. REQUIRING NPDES PERMITS FOR WATER TRANSFERS WOULD INTERFERE WITH INTERSTATE COMPACTS AND THIS COURT'S WATER APPORTIONMENTS.

A significant number of water transfers occur on interstate stream systems, the waters of which are allocated

---

[10] While conveyances are not subject to NPDES permitting, the Colorado statute prohibits the discharge of any pollutant into a ditch or man-made conveyance for the purposes of evading NPDES permitting requirements. COLO. REV. STAT. § 25-8-501(1). Thus, a discharger could not evade permitting by discharging pollutants to a water transfer rather than a stream.

among the States by interstate compact or Supreme Court decree.[11] Extending the NPDES Program to water transfers – the holding of the Second Circuit – would interfere with such interstate allocations without a clear statement that Congress intended to do so.

States may not be able to utilize fully their legal entitlement to use scarce water if – due to technically or economically impossible NPDES Program requirements – they cannot transfer legally available water from one basin to another to meet demands. For example, Colorado uses a portion of its Colorado River Compact entitlement to meet needs in the South Platte River and Arkansas River Basins. These basins lack adequate native water to meet Colorado's needs and its Compact delivery requirements to downstream States. Similarly, New Mexico uses much of its Colorado River Compact entitlement in the Rio Grande Basin; Arizona uses most of its entitlement in the Gila and Salt River Basins; and California transfers much of its entitlement outside the basin to serve coastal communities. Trans-basin water transfers also often mitigate the impact of native water diversions in the receiving basin, allowing a State to meet its water delivery obligations to downstream States in the receiving river basin. For example, New Mexico uses Colorado River Basin water to meet needs in the Rio Grande Basin, which is often water short, thus helping to ensure that the State can meet its delivery obligations under the Rio Grande Compact. *See* Rio Grande Compact, 53 Stat. 785 (1939).

---

[11] *See, e.g.*, Colorado River Compact, 42 Stat. 171 (1921) (among Ariz., Cal., Colo., Nev., N.M., Utah, and Wyo.); *Arizona v. California*, 373 U.S. 546 (1963) (allocating the lower Colorado River among Ariz., Cal., and Nev.).

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully urge the Court to grant New York City's Petition for Certiorari.

Respectfully submitted,

JOHN W. SUTHERS,
Attorney General
DANIEL D. DOMENICO,
Solicitor General*
WILLIAM C. ALLISON, V, First
Assistant Attorney General
ANNETTE M. QUILL,
Assistant Attorney General
State of Colorado
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
303-866-4500
303-866-3558 (fax)

GARY K. KING,
Attorney General
STEPHEN R. FARRIS,
Assistant Attorney
General
JUDITH ANN MOORE,
Assistant Attorney
General
State of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico
87504
505-827-6010
505-827-4440 (fax)

**Counsel of Record for all Amici*